

Supreme Court, U. S.

FILED

JAN 18 1979

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5374

MICHAEL LEE SMITH,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF MARYLAND

BRIEF OF PETITIONER

Howard L. Cardin

James J. Gitomer

CARDIN & GITOMER

233 Equitable Building

Baltimore, Maryland 21202

Attorneys for Petitioner

INDEX

| | <i>Page</i> |
|--|-------------|
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED | 2 |
| QUESTION PRESENTED FOR REVIEW | 3 |
| AGREED STATEMENT OF THE CASE | 3 |
| SUMMARY OF ARGUMENT | 5 |
| ARGUMENT | 7 |
| CONCLUSION | 31 |

TABLE OF AUTHORITIES CITED

| | |
|---|----------------|
| Application of the U.S.A. in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device, 538 F.2d 956 (2nd Cir., 1976) | 15,16 |
| Application of the U.S.A. for an Order Authorizing Installation and Use of a Pen Register, U.S.A. v. South- western Bell Telephone Company, 546 F.2d 243 (8th Cir., 1976) | 15,16,24 |
| Boyd v. U.S.A., 116 U.S. 16 (1886) | 22 |
| Hodge v. Mountain States Tel. & Tel. Company, 555 F.2d 254 (9th Cir., 1977) | 12 |
| Katz v. U.S.A., 389 U.S. 347 (1967) | 6,8,9,10,12,14 |
| Olmstead v. U.S.A., 227 U.S. 438 (1928) | 21,27 |
| Osborne v. U.S.A., 385 U.S. 323 (1966) | 10 |
| U.S.A. v. Albert Sander Brick, 502 F.2d, 219 (3rd Cir., 1974) | 18 |

(ii)

| | |
|---|-----------|
| U.S.A. v. Baxter, 492 F.2d 150, (9th Cir., 1973) | 12 |
| U.S.A. v. Billy Cecil Doolittle, 507 F.2d 1368 (5th Cir., 1975) | 15 |
| U.S.A. v. Clegg, 509 F.2d 605 (5th Cir., 1975) | 12 |
| U.S.A. v. Giordano, 416 U.S. 505 (1974) | 14 |
| U.S.A. v. Illinois Bell Telephone Company, 531 F.2d 809 (7th Cir., 1976) | 24 |
| U.S.A. v. Miller, 425 U.S. 435 (1976) | 13 |
| U.S.A. v. New York Telephone Company, — U.S. —, 98 S.Ct. 363 (1977) | 6,9,24,25 |
| U.S.A. v. Nick John, 508 F.2d 1134 (8th Cir., 1975) | 15 |
| U.S.A. v. Pasquale Falcone, 505 F.2d 478 (3rd Cir., 1974) | 15 |

Constitutional Provisions

Constitution of the United States

| | |
|--------------------------|---------------|
| Amendment One | 7,17 |
| Amendment Four | <i>passim</i> |
| Amendment Fourteen | 2 |

Statutes

United States Code

| | |
|--|----------|
| Federal Rules of Criminal Procedure | |
| Rule 41 | 10,16,24 |
| Federal Rules of Criminal Procedure | |
| Rule 57 (b) | 24 |
| Omnibus Crime Control Act & Safe Streets Act of 1968, Title 18 U.S.A. | |
| 2510 et.seq. | 4,26 |

(iii)

Maryland Statute

| | |
|--|---|
| Courts & Judicial Proceedings §10-401 Declaration of Policy | 3 |
|--|---|

Miscellaneous

| | |
|---|----|
| A. Miller, Assault on Privacy | 19 |
| Circumventing Title III, The Use of a Pen Register Surveillance in Law Enforce- ment, 1977 Duke L.J. 751, 759 | 19 |
| Cornell Law Review (60 Cornell L.R. 1028) | 29 |
| Foreign Intelligence Act of 1978 (Senate Bill 1566) | 20 |
| Subcommittee on Intelligence and the Rights of Americans of the Select Committee on Intelligence of the United States Senate | 20 |

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-5374

MICHAEL LEE SMITH,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF MARYLAND

BRIEF OF PETITIONER

OPINION BELOW

The Opinion of the Court of Appeals of Maryland is reported at 283 Md. 156, 389 A.2d 858 (1978) and as printed in the Appendix, *infra*, page A-1.

JURISDICTION

The judgment of the Court of Appeals of Maryland which is to be reviewed was dated July 14, 1978. The Petition for Writ of Certiorari was filed in this Honorable Court on September 11, 1978 and was granted on December 4, 1978.

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 (3), and the Fourth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

AMENDMENT IV [1971]

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT XIV [1868]

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without,

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5. "The Congress shall have the power to enforce by appropriate legislation, the provisions of this article."

Courts & Judicial Proceedings Section 10-401 Declaration of Policy

"The right of people to be secure against unreasonable interception of telephonic and telegraphic communications may not be violated. The interception and divulgence of a private communication by any person not a party thereto is contrary to the public policy of the State, and may not be permitted except by Court Order in unusual circumstances to protect the state that detection of the guilty does not justify investigative methods which infringe upon the liberties of the innocent."

QUESTION PRESENTED FOR REVIEW

I. Does the installation of a pen register without a Court Order issued upon a showing of probable cause violate the Fourth Amendment of the Constitution of the United States?

AGREED STATEMENT OF THE CASE

The Petitioner, Michael Lee Smith, was charged under criminal information number 57609713 with the crime of common law robbery. The Petitioner entered a plea of not guilty and proceeded before the Trial Court sitting without the aid of a jury. At the outset, the

Petitioner's attorney advised the Court that there was no real contest as to the facts and submitted same under an Agreed Statement of Facts. However, on behalf of your Petitioner, counsel advised the Court that crucial evidence obtained by the State of Maryland was a direct result of a pen register which had been placed on the telephone of your Petitioner without the authority or authorization of a search warrant. Your Petitioner through counsel advised the Court that it was his contention that although a pen register did not have to meet the requirements of Title 18 §2510 (or similar requirements of the Annotated Code of Maryland) it could not be properly attached unless the requirements of the Fourth Amendment to the Constitution of the United States had been satisfied (i.e. the procuring of a Court Order based on probable cause).

The presentation of facts by the Assistant State's Attorney revealed that Patricia McDonough was the victim of a robbery on March 5, 1976. During that robbery her wallet, which included her name and address, was taken. After the incident, and over a period of several days Ms. McDonough received obscene and annoying telephone calls from her assailant. These telephone calls did not occur in a regular pattern.

Unable to identify her assailant by sight, Ms. McDonough began tape recording the calls with the advice and knowledge of the Baltimore City Police Department. As a result of these tapes and continuing investigation, a request by the police was made of the C & P Telephone Company to place a pen register device on the telephone lines leading from the home of the Petitioner. The telephone company voluntarily complied with this request. No search warrant or Court

Order was ever obtained by the police for the use or installation of the pen register.

The pen register recorded the telephone numbers dialed from the home of the Petitioner; but did not indicate whether the calls were completed. The telephone was listed to Robert L. Smith, the father of the Petitioner. As consequence of the pen register, and further investigation, the police were able to determine that the Petitioner was the assailant of Ms. McDonough.

The Trial Court ruled that the installation of said device did not require prior authorization nor did it violate the Fourth Amendment (Appendix) accordingly the evidence was admitted; a judgment of guilty was entered; and your Petitioner sentenced to six (6) years under the jurisdiction of the Department of Correctional Services.

With the proper guidelines and standards set up by the Maryland Rules of Procedure appeal was entered to the Court of Special Appeals of Maryland. However, the Court of Appeals of Maryland (the highest Appellate Court in the State of Maryland) issued a Writ of Certiorari on its own Motion and considered the case without benefit of Opinion by the Court of Special Appeals. The Court of Appeals rendered a four-three decision affirming the conviction of your Petitioner.

SUMMARY OF ARGUMENT

Petitioner argues that the installation of a pen register device constitutes a search and ultimate seizure

under the Fourth Amendment to the Constitution of the United States. In this case, Respondent and the Court of Appeals of Maryland concede that if the installation of such a device constitutes a search, Fourth Amendment safeguards must be satisfied before commencement of the installation procedures.

It is Petitioner's contention that "intangibles" are as much a part of the Fourth Amendment as are tangible items, *Katz v. U.S.*, 389 U.S. 347 (1967) and *U.S. v. New York Telephone Company*, 98 S.Ct. 363 (1977). The key issue is described as the two part test first described in *Katz*, that is, first—"a person must have exhibited an actual (subjective) expectation of privacy"; and second this expectation must be one "that society is prepared to recognize as reasonable."

Petitioner by his actions showed that he expected that his conduct would not be intruded upon by the "uninvited ear" by using the telephone in his house to the exclusion of all others. Analogy is made to the actions of Petitioner in the case at bar with the conduct of the accused in *Katz*. By closing the telephone door, Katz sought to exclude the public; by using the phone in the privacy of his home, Petitioner likewise sought to exclude the public.

The second prong of the *Katz* test involves a balancing of the private interest of an individual against the effect that the regulation would have on effective law enforcement. Petitioner suggests six criteria that this Court should consider to see whether society is prepared to recognize the advocated privacy interest: (1) Extent of burden placed on law enforcement, (2) possibility of abuse, (3) need for specificity in guidelines and standards, (4) recognition of individual rights and respect for those rights by law enforcement

officers, (5) "chilling effect" upon the exercise of First Amendment freedom of speech (restraint of First Amendment freedoms) and, (6) the uniqueness of pen registers and the telephone company.

Scrutiny of each of these criteria reveals the advantages of requiring a Court Order prior to installation of a pen register. The police will add a dimension of professionalism to their duties, the burden placed upon them is minimal and the possibility of abuse is dramatically reduced. In sum, freedom of speech (and association) is protected while guidelines for present situations and future technological advances have been specified.

ARGUMENT

DOES THE INSTALLATION OF A PEN REGISTER WITHOUT A COURT ORDER OR SEARCH WARRANT VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES?

The issue presented by the case of Michael Lee Smith is one which largely results from the technological advances made by our modern society. One hundred years ago, fifty years ago—even twenty-five years ago—judges and lawyers did not even dream of such a problem. In order to properly understand the issue and the ramifications it has, a brief survey of the field of electronic surveillance is necessary as well as an indepth look into where this field is taking the police officer and the individual citizen.

Law enforcement officers have a variety of electronic devices which permit them to see and hear what they might otherwise be incapable of obtaining. These

devices, it is argued, enhance the effectiveness of law enforcement; but it has been recognized that they pose serious threats to Fourth Amendment values. Recently, various Federal and State Courts have been asked to decide whether electronic surveillance by means of a pen register incur the full panoply of Fourth Amendment protections, or like traditional surveillance needs no judicial supervision.

The Courts which have considered this problem have recognized that the Fourth Amendment implications depend on the interpretation of this Court's holding in *Katz v. U.S.*, 389 U.S. 347 (1967). *Katz* modified a long line of cases that determined the validity of searches and seizures by electronic surveillance by reference to property rights. Before *Katz*, electronic interception of oral communications was permitted so long as the techniques employed did not physically invade a "constitutionally protected area". This approach proved to be inadequate, however, because it required fine distinctions concerning the degree of "penetration" necessary to cause a Fourth Amendment violation. Often the legal result turned more on the type of device available to the police than the effective reach of the surveillance itself.

Katz presented an extension of Fourth Amendment protection beyond the limits of the doctrine of "constitutionally protected areas." Although litigation in the lower Courts and arguments before this Court debated whether the surveillance involved physical intrusion into a constitutionally protected area, this Court departed from this standard on the grounds that it deflected attention from the real Fourth Amendment issues at stake.

Espousing the position "The Fourth Amendment protects people, not places", *Katz*, supra (398 U.S. at 351), the inquiry of this Court focused on the defendant's privacy rather than the location of the "bug". Rejecting the concept that privacy interest must be bound to property rights, this Court held that the privacy may also adhere to intangibles such as the defendant's conversations. Moreover, an individual may be entitled to Fourth Amendment protections in public areas as well as in the privacy of his home. In sum, the general rule was adopted as follows:

"What a person normally exposes to the public even in his own home, is not a subject of Fourth Amendment protection. . . but what he seeks to preserve as private even in the area accessible to the public, may be constitutionally protected."
Katz, supra, 389 U.S. at 351-2.

Applying this reasoning to the facts before it, this Court found that by shutting the door to the booth and by paying for the call the accused had taken steps to exclude the "uninvited ear"; that he had "justifiably relied" on the privacy of his conversations; and that he was therefore "entitled" to protection from electronic surveillance. As a result, use of the bugging device represented "a search and seizure" within the meaning of the Fourth Amendment.

Thus, the question posed as to whether "intangibles" can be subject to a search and seizure was answered by this Court in *Katz*. In spite of this, attorneys and courts sought to interpret the statements by this Court in *Katz* disputing and construing the question as to whether intangibles can be subject to the ordinary rules of search and seizure. This Court in the decision of *U.S. v. New York Telephone Company*, 98 S.Ct. 363 (1977) put that question to rest:

"Indeed we recognized in *Katz v. U.S.*, 389 U.S. 347 (1967), which held that telephone conversations were protected by the Fourth Amendment, that Rule 41 is not limited to tangible items but is sufficiently flexible to include within its scope electronic intrusions authorized by a finding of probable cause, 389 U.S. at 354-356 and note 16. See also *Osborne v. U.S.*, 385 U.S. 323, 329-331 (1966).

With the issue of "intangibles" put to rest, the critical test considered by courts is the *Katz* doctrine of "Reasonable Expectation of Privacy". This test has become a two part test for determining the privacy of interests to which the Fourth Amendment extends: First, "a person must have exhibited an actual (subjective) expectation of privacy; and second, this expectation must be one "that society is prepared to recognize as reasonable." Thus when a Fourth Amendment right is asserted, courts generally have inquired whether the facts of the case, taken as a whole, justify "a reasonable expectation" that the matter sought to be preserved as private would be protected from warrantless government invasion.

It would appear that the two types of privacy are generally deemed quite reasonable: Those that are commonly asserted and those that, though less frequently claimed, nevertheless play a significant role in community life. As such, the "reasonable expectation" standard compels the courts to decide the degree of social solidarity or significance sufficient to raise a Fourth Amendment claim. In order to make this decision, the test applies no particular standards. Instead, there is a need to weigh particular privacy interests against other values such as a need for effective law enforcement.

A survey of various decisions indicates that in some cases even though privacy has been clearly invaded, the Courts may be tempted to abandon the warrant requirement and to permit warrantless searches on the basis of comparisons between the strength of the pertinent privacy interest and the need for law enforcement. In striking such a balance, courts may view the reasonableness of the privacy claim merely as an inverse function of the reasonableness of the search. For a search to be reasonable, countervailing privacy values may be considered insufficient to require strict adherence to constitutional protections.

A consequence to this approach is the potential erosion of Fourth Amendment protections because it balances an indeterminate personal value against the recognized governmental interest. An individual bears the burden of proving his privacy expectations are reasonable, that is, that they are recognized by society at large. But because privacy interests may be difficult to define, and are generally raised by those who stand convicted of a crime, it is both easy and psychologically appealing to minimize the "costs" to society permitting a warrantless search. Only the purpose of concealing crimes seems patently "unreasonable".

Thus, a first criteria which must be determined is whether the defendant exhibited an actual expectation of privacy. That is, whether the Petitioner although he obviously failed to protect his placing of the telephone call from governmental intrusion, adopted reasonable means for protecting them from the "uninvited eye or ear" of the curious stranger. By taking such action, the call itself was private with respect to the public at large and will be protected by the Fourth Amendment against the government's uninvited eye and ear.

Whether the Petitioner should have "expected" government surveillance is wholly irrelevant to this test. The only "risk" of exposure that the court regarded as significant in terms of the Fourth Amendment in *Katz* was that the members of the public might hear what was being said. Once this risk was eliminated by shutting the door of the booth, the accused was protected by the constitution from additional actions the police might take to discover his activities. Similarly, in the case at hand, by using the telephone at his home to the exclusion of all others, this petitioner (Michael Lee Smith) eliminated the risk of exposure just as *Katz* did by shutting the door of the booth.

This concept was enunciated by Judge Eldridge when he stated in dissent:

"The principal basis for the view that the use of a pen register does not constitute a search for purposes of the Fourth Amendment seems to be the conclusion of some judges that there is no justifiable expectation of privacy with respect to numbers dialed because '[t]elephone subscribers are fully aware that records will be made of their toll calls.' *United States v. Baxter*, 492 F.2d 150, 167 (9th Cir., 1973), cert. denied, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974). See also *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F.2d 254, 256, 266 (9th Cir. 1977); *United States v. Clegg*, 509 F.2d 605, 610 (5th Cir. 1975). This theory is relied on by the majority in the instant case.

However, the mere fact that a person who thinks about it would realize that the numbers dialed in completed long distance calls would have to be recorded for billing purposes, does not, in my judgment, warrant the conclusion that no reasonable expectation of privacy exists generally with

respect to telephone numbers dialed. Such calls represent only a small percentage of those made by the average individual. The overwhelming majority of calls made by the average person are local and do not involve toll charges. Moreover, as to calls outside of one's local area, many are not answered or result in busy signals. Nevertheless, the pen register records even these. Because one's expectation of privacy in a particular type of situation may not be fully realized in a minority of instances does not necessarily make that expectation unreasonable.

The majority's attempted analogy between *United States v. Miller*, 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), and the situation in the instant case is unpersuasive. In *Miller*, with regard to checks and deposit slips, the Supreme Court observed that the 'depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.' But it was not the telephone company which instigated the installation of the pen register in the instant case. *Miller* is thus distinguishable by the fact that here, absent the government's intrusion, the telephone company *could* not have revealed any information to the government regarding Smith's calls. Normally the telephone company does not, in any meaningful sense, possess information about local telephone calls which it could pass on. The mere fact that machines (switching equipment) owned by the telephone company responded in certain ways to the defendant's dialing numbers cannot reasonably be construed as a transfer of information by the defendant to the telephone company. There is no indication in this case that the telephone company's machinery preserved a record of the numbers dialed, nor that any telephone company employee did or could be expected to observe the

process. The defendant, by the simple act of dialing local numbers, did not reasonably intend to reveal information; he merely made use of machinery in particular ways which, without the police intrusion, would have remained fully private.

In sum, I agree with the position suggested by Mr. Justice Powell, dissenting in part in *United States v. Giordano*, 416 U.S. 505, 548, 553-554, 94 S.Ct. 1820, 1842, 1845, 40 L.Ed.2d 341 (1974), that the permissibility of law enforcement officials using a pen register depends upon compliance with the requirements of the Fourth Amendment."

The courts emphasis on means and on their effectiveness in securing privacy from the public at large leads to a workable standard for determining Fourth Amendment protection. The Government must stand in the shoes of the public: It may see, know and take without a warrant, only what members of the public may see, know and take. So long as an individual has protected his privacy against intrusion by his fellow citizens, he may assume he is also protected against governmental interference. Thus, his reliance on Fourth Amendment protection is "justifiable" if the means he has employed to preserve his privacy are calculated to be effective against reasonably curious members of the public at large. Defining Fourth Amendment protection in terms of the reasonably curious person clarifies what this Court meant in *Katz* when it said: "What a person knowingly exposes to the public" is not subject to Fourth Amendment protection but "what he seeks to preserve as private. . . may be constitutionally protected."

The second portion of the reasonable expectation of privacy test is the one which has given courts more difficulty. It is also that portion of the test which is most germane to the issue presented by this case, i.e., whether society will recognize as "reasonable" a right of privacy in the making of telephone calls and the location to which these calls are made. In this portion of the test, the question of balancing "privacy interests" against "effective law enforcement" is paramount.

A considerable number of state and federal cases have considered the issue so presented and have ruled that the pen register does indeed activate a search and seizure. As such, its installation requires the satisfying of Fourth Amendment safeguards. It is submitted that these cases are more carefully reasoned and that they suggest more persuasive arguments than those supporting the opposite view. Moreover, a review of the dissenting opinions in these supportive cases reveal that the concern is for more safeguards and regulations, not a reduction of them. In combination, overwhelming authority is provided for Fourth Amendment Safeguards. See: *Application of the United States of America in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device*, 538 F.2d 956 (1976); *Application of the United States for an Order Authorizing Installation and Use of a Pen Register*, U.S.A. v. *Southwestern Bell Telephone Company*, 546 F.2d 243 (1976); U.S.A. v. *Illinois Bell Telephone Company*, 531 F.2d 809 (1976); U.S.A. v. *Nick John, et al*, 508 F.2d 1134 (1975); U.S.A. v. *Albert Sander Brick, et al*, 502 F.2d 219 (1974); U.S.A. v. *Billy Cecil Doolittle, et al*, 507 F.2d 1368 (1975); U.S.A. v. *Pasquale Falcone, et al*, 505 F.2d 478 (1974).

In *Application of the United States of America in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device*, 538 F.2d 956 (1976), the Court of Appeals for the Second Circuit reasoned:

"We agree with the Seventh Circuit that a pen register order may only be issued after a showing of probable cause. We cannot concur in the view, voiced by some commentators, that pen register orders are constitutionally indistinguishable from mail covers, which are initiated by subpoena, and therefore should fall outside Rule 41."

This statement by the Second Circuit responds specifically to the argument advocated by the Respondent in its analogy to mail covers.

In *Application of the United States of America v. Southwestern Bell Telephone Company*, 546 F.2d 243 (1976), the Court of Appeals for the Eighth Circuit reviewed both sides of the argument and decided:

"It is our view that the propriety of a pen register's usage depends entirely upon compliance with the Fourth Amendment rather than Title III."

The reasoning of the Eighth Circuit is more pertinent:

"The court's power to order pen register surveillance is the equivalent of the power to order a search warrant and is inherent in the district court. It is clear upon the record before us that the district court issued the order based upon a showing of probable cause. We conclude that the district court's approach, with all of the attendant Fourth Amendment safeguards, was a valid exercise of authority."

The "Balancing Test" might also be described as follows: Where the effect of regulation severely reduces

effective law enforcement, individual rights may suffer; while where the effect on law enforcement is minimal, individual rights should be more keenly protected. The following opposing considerations must then be considered: (1) extent of burden placed on law enforcement, (2) possibility of abuse, (3) need for specificity in guidelines and standards, (4) recognition of individual rights and respect for those rights by law enforcement officers, (5) "chilling effect" upon the exercise of First Amendment freedom of speech (restraint of First Amendment freedoms) and, (6) the uniqueness of pen registers and the telephone company.

It is obvious that to require police officers to obtain a court order before installing a pen register device does place some burden upon them. However, when one carefully scrutinizes the extent of the burden and amount of difficulties that law enforcement officers incur one must recognize that the burden is minimal. Should pen registers be placed indiscriminately on phones of persons merely because he has been selected as a target by some overzealous police officer? No! A pen register device should be limited to those situations where sufficient information has come to law enforcement officers to justify this invasion of privacy. The amount of that information, the standard to be applied, should be that of "probable cause". Failure to require this minimal gathering of information prior to the installation of such a device would lead to the problems discussed later in this brief revealed by the Senate Subcommittee on Intelligence. The true effect of requiring a police officer to obtain a court order before installing a pen register device is *twofold*: better preparation of the case by the police officer and some

judicial overseeing of this stage of police investigation. Both of these results are in fact desirable. Yes, additional time and effect will be required on behalf of police officers; but the professionalism that it gives to the preparation of the case and the judicial overseeing of same will in the long run produce better and more efficient law enforcement.

The possibility of abuse of pen register devices has been discussed at length by judges, lawyers and laymen. This possibility of abuse was in fact, one of the major reasons advanced by Judge Cole in his strong dissent in the Court of Appeals of Maryland:

"Finally, the majority dismisses Smith's contention rather summarily by stating that '[e]ven if he did harbor such an expectation, we are not prepared to say on the record before us that it is one that society would recognize as reasonable and constitutionally protected.' I emphatically disagree.

Not only is society prepared to recognize this expectation of privacy in the use of one's home telephone but society would welcome the fact that this Court would declare its recognition of the right and protect it. Stated differently, I do not believe anyone in our society would be surprised to learn that the police were illegally tapping phones, examining mail or otherwise engaging in unlawful snooping. However, they would be shocked to learn that this Court or any other court condoned, tolerated or put its stamp of approval on such practices.

The majority fails to give due weight to the impact of Watergate and its progeny, the recent revelations of illicit surveillance conducted by the F.B.I. upon activities of various civil rights, labor and political leaders, or indeed, the potential abuse to

which the pen register may be put by police authorities.¹ These factors and others have created an environment of distrust, fear and lack of confidence.

I believe society condemns any such unlawful practice and awaits the forces of good to restore the basic right of privacy which has been steadily eroded. I believe that each citizen still clings to the notion that while being deprived of his privacy, he still has the right to it and relies upon the courts to safeguard that privacy from warrantless intrusion.

Lest we forget, the heart of the Fourth Amendment is to protect citizens against every unjustifiable intrusion by the state upon their privacy, whatever the means employed. For the Fourth Amendment to remain viable, it must adjust to the times and afford protection against new forms of invasions of privacy, however sophisticated and whether they are generated through electronics or even advances in the psychic or related sciences.

In the instant case, no such intrusion was legal without proper review of a magistrate. I would recognize Smith's right of privacy and suppress the fruits of the warrantless search."

Abuse of electronic eavesdropping and surveillance

¹A pen register may be subject to abuse because it may be easily converted into a wiretap by attaching headphones or a tape recorder to appropriate terminals on the pen register unit. Newer models of pen registers have automatic voice actuated switches which can automatically turn a tape recorder on and off as the telephone is used. See Note, *Circumventing Title III, The Use of Pen Register Surveillance in Law Enforcement*, 1977 Duke L. J. 751, 759. The pen register also has the potential of inhibiting freedoms of association. If pen register data were fed into a central computer on a widespread basis, patterns of acquaintances and dealings among a substantial group of people would be available to the government. *A. Miller, Assault on Privacy, supra.* at 43.

devices was the subject matter of the 1978 hearings and findings of the Subcommittee on Intelligence and the Rights of Americans of the Select Committee on Intelligence of the United States Senate. Although the inquiry was as a result of Senate Bill 1566 dealing with Foreign Intelligence Act of 1978, the testimony and conclusions are most apropos to the case at hand. In commencing the proceedings, Senator Morgan quoted Attorney General Harlin Stone who in 1924 stated:

"There is always a possibility that a secret police may become a menace to free government and free institutions, because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood."

Also as a preliminary, the Committee recognized that:

"After all it was the abuse of so-called 'general warrants' and 'writs of assistance' in colonial America and 18th century England which led to the Fourth Amendment."

After exhaustive hearings, the Subcommittee reached the following conclusions:

"The intrusiveness of these techniques has a second aspect as well. It is extremely difficult, if not impossible, to limit the interception to conversations that are relevant to the purposes for which the surveillance is placed. Virtually all conversations are overheard no matter how trivial, personal or political they might be. When the electronic surveillance target is a political figure who is likely to discuss political affairs or a lawyer who confers with his clients, the possibility for abuse are obviously heightened. . ."

"Extremely personal information about the target, his family, and his friends is easily obtained from wiretaps as well as microphones. . ."

"The highly intrusive nature of electronic surveillance also raises special problems when the targets are lawyers and journalists. . . Such wiretaps represent a serious threat to attorney-client privilege, because once they are instituted they are capable of detecting all conversations between a lawyer and his clients even though it is relating to pending criminal cases. . ."

"In the absence of effective outside control, highly intrusive techniques have been used to gather vast amounts of information about the entirely lawful activities—and privately held beliefs—of large numbers of American citizens. The very intrusiveness of these techniques demands the utmost circumspection in their use. . ."

"The F.B.I.'s ability to gather information without effective restraints gave it enormous power. That power was inevitably attractive to politicians, who could use information on opponents and critics for their own advantage. . . By providing politically useful information to the White House and congressional supporters, sometimes on demand and sometimes gratuitously, the Bureau buttressed its own position in the political structure."

The above comments were specifically directed to use of wiretapping and electronic bugs but are certainly analogous to the question of a pen register. The possibility and actual abuse of the devices specifically considered by the Senate Subcommittee are the same abuses available by the user of a pen register. The Subcommittee recognized this aspect of the problem when it quoted the dissent in *Olmstead v. U.S.*, 227 U.S. 438 (1928):

"Subtler and more far reaching means of invading privacy have become available to the government. . . (and) the progress of science in furnishing

the government with means of espionage is not likely to stop with wiretap. Ways may someday be developed by which the government without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a juror the most intimate occurrences of the home. . . Can it be that the Constitution affords no protection against such invasions of individual security?"

And when it quoted from *Boyd v. U.S.*, 116 U.S. 16 (1886):

"It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property. . ."

What then the Subcommittee saw and found was that without strict guidelines (as opposed to vague standards) the possibility for abuse is greatly heightened. Moreover, without the specific guidelines, there is absolutely no way for law enforcement officers to properly gauge their conduct. Speculation as to what is and what is not proper is determined by a police officer whose biases and prejudices will certainly enter into his decision; and in the long run, personal rights suffer.

The Senate Committee did recognize that techniques such as the pen register can be effective and useful law enforcement devices when properly regulated and subject to specific guidelines:

"One of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our nation's security on the one-hand and the preservation of basic human rights on the other."

In this regard, the testimony and prepared statement of David L. Watters, Washington Representative, American Privacy Foundation is most pertinent:

"The dangerous aspect of allowing this procedure to occur outside the control of the wiretap laws is that the language of these significant court cases use the phrase 'pen registers and like devices'. The 'and like devices' opens up the gate for a host of unspecified surveillance devices which scan non-oral communications. Telex, data, multi-frequency tones, and switching and signaling functions; operations occurring on broad band trunk lines such as our toll microwave circuits."

"Other than the fact that a chapter 119 wiretap order is a mite more difficult to obtain—the probable cause requirement is a bit stiffer—why all this fuss. A Court Order is a Court Order."

"The bottom line significance of this whole case has never been articulated in the public. The significance hinges on the reporting requirements of the wiretap law."

It was and is the position of Mr. Watters that pen registers and like devices should fall within the confines of the wiretap law. Of course, this Court has already held that this concern is without merit. However, the fears and points raised in attempting to bring the pen register device within the wiretap statute sound even louder when we concern ourselves with regulation by means of the probable cause Court Order. The dissents in those cases which have held that a pen register falls outside of the stringent requirement of the wiretap statute asked for stricter regulation of the pen register device; to allow no regulation of such a device is to take no heed to the opinions of these learned judges.

Various comments by this Court as well as opposing counsel in their briefs filed in the case of *U.S. v. New York Telephone Company*, 98 S.Ct. 363 (1967) are pertinent to the present inquiry. In footnote seven this Court stated:

"The Court of Appeals held that pen register surveillance was subject to the requirements of the Fourth Amendment. This conclusion is not challenged by either party and we find it unnecessary to consider the matter. The government concedes that its application for pen register order did conform to the requirements of Title III."

However, this Court went on to state that it agreed with the Court of Appeals that the Court had the power to authorize (emphasis added) the installation of pen registers. Noting that the Order in the *New York Telephone Company* case was predicated upon a proper finding of probable cause and that no claim was made that it was in any way inconsistent with the Fourth Amendment this Court noted:

"The Courts of Appeals that have considered the question have agreed that pen register orders are authorized by Federal Rule of Criminal Procedure 41 or by an inherent power closely akin to it to issue search warrants under circumstances conforming to the Fourth Amendment. See *Michigan Bell Telephone Company*, supra; *Southwestern Bell Telephone Company*, supra; *Illinois Bell Telephone Company*, supra."

"Although we need not decide whether Rule 57(b) by itself would authorize the issuance of pen register orders, it reinforces our conclusion that Rule 41 is sufficiently broad to include seizures of intangible items such as dial impulses recorded by pen registers as well as tangible items."

Thus, without specifically deciding the issue, this Court in *New York Telephone Company* by dicta indicated its approval of the rationale of those cases which have found that the proper use of a pen register device requires compliance with the guidelines of the Fourth Amendment.

What is perhaps more intriguing is the arguments of opposing counsel contained in their briefs filed before this Honorable Court. The first point raised by the telephone company was that modern pen registers can easily be converted to a wiretap by merely plugging headphones or tape recorders into the pen register device. It must be borne in mind that this argument advanced by the telephone company was in an effort to convince this Court that regulation of a pen register device should be governed by Title III. The government responded to this argument as follows:

"It is true that when a pen register is attached to a subscriber's line the same physical connection can be used to attach other equipment that can intercept oral communications. But agents who conduct pen register investigations are instructed that any monitoring of wires is unlawful and should not be attempted."

"Some pen registers have jacks, as Respondent notes, that permit the attachment of other equipment sensitive to voices; without such equipment, however, the monitoring of conversations is impossible and agents are not issued the additional equipment. Moreover, when possible, any jacks are disabled from the inside before the pen registers are installed."

The government further contended:

"All this entirely ignores that a pen register warrant authorizes, as did the warrant here, only

the installation and use of a pen register and Congress has already legislated to prevent precisely the type of abuse envisioned by the Court majority and respondent. Under Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 if a federal—or any other law enforcement officer—engaged in unauthorized wiretapping by plugging into a pen register as respondent suggest he would be subject to severe criminal sanctions and civil liability. To speculate that despite these sanctions, violations might occur, and to transform this speculation into a basis for a court's withholding authorization, is to argue against the issuance of a search warrant of any sort. One might as well say, for example, that a Court should not grant a warrant to search for a pistol in a suspected murderers apartment because the officers might conduct a general search for other items in violation of the Fourth Amendment."

The government further contended that law enforcement officers acting under a Court Order for the installation of a pen register who would violate that order by attaching headphones or otherwise "wire-tapping" would be in "contempt of court". This argument is most interesting because it anticipates the argument of the Petitioner in the case at hand. Petitioner does not suggest that the use of the pen register should be prevented nor limited to Title III situations; instead, he merely states that it be subject to Fourth Amendment safeguards. One important safeguard illustrated in the brief by the government in *New York Telephone Co.* is that if the agents were to violate the court order they would be in contempt of court. This fear of court action for defiance of court order is a most important reason why Fourth Amendment warrant requirements must be imposed prior to the

installation of the pen register.

Technical advances in the field of electronic surveillance are limited only by the scope of one's imagination. What was only a seed in one's imagination yesterday is today part of the arsenal of apparatus available to the modern police agent. Even as was noted by the dissent in *Olmstead v. U.S.*, supra:

"One day the prosecution may be able to present copies of documents contained in one's desk drawers without ever physically invading the room in which the desk is housed."

It is imperative in this age of technological advancement, that specific guidelines and standards be established to which law enforcement officers can look for guidance. Only with specificity in these guidelines and standards can there be protection of individual and privacy rights. With the establishment of reasonable guidelines and standards containing sufficient latitude, effective law enforcement is not restricted. Law enforcement officers can properly perform their duties and at the same time be well aware of the limits to which they may go.

On the other hand, so long as the standards and guidelines are reasonable, individual and privacy rights are protected; and the individual is apprised of that degree of privacy which can be enjoyed and will be protected by the courts. Thus, by establishing specific guidelines and standards—those within which the police can operate effectively and in which one's right of privacy is protected—a frame-work is established for technological advancement which will not permit nor promote unauthorized and improper invasion of privacy rights. Technological advances can be pro-

moted without fear of treading upon vague standards while the private citizen can feel secure by the protection of specific protected boundaries.

Another effect of the requirement of a court order before the installation of a pen register device might be described as "Notice". The court order operates as notification to law enforcement officers that they are approaching the cross-walk whereupon they will begin to tread upon personal and private rights of citizens. Prior to the request for the pen register order, one can assume that the law enforcement officers were engaging in traditional police activities. For whatever reason, the investigation has now led the investigating officer to the decision of seeking to attach a pen register device.

This decision should initiate in the police officer an understanding that the police investigation must be balanced by the right of individuals to enjoy a degree of privacy. Some of this privacy may be invaded, but only if the law enforcement officers take due care to restrict the invasion. By requiring that a court order be obtained based on an application supported by showing of probable cause, the police officer has been alerted that he has crossed the canyon and his actions must be more responsible. The requirement of the court order has provided some overseeing of the police officer's actions on the one hand and has alerted him to the possible invasion of privacy rights. It can then be assumed that the officer will proceed with an understanding of these rights, and more importantly with a respect for these rights. In sum, this warrant or court order requirement has echoed the teachings of the Fourth Amendment, i.e., that there shall be no search and seizure without a court order based upon a showing of probable cause.

In the majority opinion rendered by the Court of Appeals of Maryland, reference was made to the law review article contained in the Cornell Law Review (60 Cornell L.R. 1028). Specifically, reference was made to the fact that subscriber of telephone service is required to use apparatus supplied by the telephone company. It was argued by the majority (as contained within the law review article) that this bolsters the proposition that there should be no reasonable expectation of privacy in the dialing of a telephone number. To the contrary, however, the fact that the subscriber must use apparatus belonging to the telephone company enhances the argument of expectation of privacy.

If one had a choice as to whose apparatus to use, he might expect that because of varying procedures one's privacy may well be invaded. On the other hand, where the telephone company has been given a monopoly, one certainly has the right to expect that his right of privacy will be even more protected, honored and respected. Even where it is necessary for the telephone company to record phone numbers for housekeeping duties (such as long distance phone calls) the subscriber has a right to expect that such action would be taken strictly for telephone company convenience. Certainly where one has no choice as to the facility he will use, and he is well aware of the fact that the facility is regulated by government agencies (congress, state legislatures, public service commissions, etc.) this expectation that one's privacy will be respected is even more strongly augmented. Thus, this lack of choice with regards to this public utility suggests that one can expect to use the facility without the interference of the "uninvited ear".

Lastly, the failure of this Court to require a court order prior to the installation of a pen register device is to encourage a "chilling effect" upon the exercise of freedom of speech. Freedom of speech and the related concept of freedom of association are seriously affected when an individual fears that his contacts may become public. Here, reference is made to the "chilling effect", i.e. individuals shy away from contacts with others not because their conduct is illegal but because of a fear that others may infer illegality, immorality or favoring a minority viewpoint.

Under the last consideration, the Court must look at the practical aspects of the issue rather than the strictly legal aspects i.e. what effect will this Court's ruling have upon the general populus. If a police officer for whatever reason decides to install such a device he may do so under the position advocated by the Respondent. The individual citizen knowing this may well be intimidated by this possibility—he may be paranoid, he may be a political dissident, he may be an aspiring politician, he may just enjoy seclusion. Whatever the reason, he becomes fearful that he may invoke condemnation for a purely proper and innocent contact. The result is that contacts will not be made, social intercourse is destroyed, and the community is hurt.

Under the proposition urged by Petitioner, the individual is secure by the recognition that such action will not be taken unless and until a judicial officer satisfied that probable cause exists has sanctioned the actions. One recognizes that as a tool for criminal investigation the pen register device may be useful when sanctioned by the Courts and limited in its scope. In such circumstances, its potential for abuse has been

reduced; the procedures for obtaining its installation have been defined; and its "chilling effect" on freedom of speech is eliminated.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petitioner's conviction and sentence be reversed.

Respectfully submitted,

Howard L. Cardin
James J. Gitomer
CARDIN & GITOMER
233 Equitable Building
Baltimore, Maryland 21202
Attorneys for Petitioner